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Original Study

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Archaeological Responses to 5 Decades of Metal Detecting in Austria

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Abstract: Since metal detecting started in Austria in 1970, the National Heritage Agency (BDA) has focussed too much on prohibiting metal detecting. The strategy chosen, increasingly restrictive legislation, has turned out to be a failure. Rather than improving the protection of archaeological heritage from ,unauthorised‘ metal detecting, the ,hobby‘ has grown steadily. Yet, the changes to the law have made protecting archaeology more difficult and are restricting civil liberties, quite possibly making the law itself illegal. Five decades on, Austrian archaeology isn’t better off, but considerably worse, and it is mainly our attempts to prevent metal detecting that are to blame.

Keywords: Austria, archaeology, metal detecting, heritage law, Denkmalschutzgesetz

1 Introduction

Nearly half a century has passed since metal detectors became easily available to members of the public in Austria. The official Austrian finds reports, the *Fundberichte aus Österreich* (FÖ), published by the Austrian National Heritage Agency (BDA) since 1930, show that ‘the hobby’ emerged in Austria in, precisely, the year 1970.

Particularly the reports of coin finds allow us to demonstrate this quite clearly. Naturally, the number of coins found per annum varies greatly, mainly depending on whether large coin hoards are found or not, from as little as 107 coins in 1968 to as many as 31,050 in 1979 (fig. 1). However, both the percentage of coins found in hoards and the absolute numbers of coins found as ‘single finds’ changes dramatically from the year 1970 onwards: while until 1969, almost all coin finds come from hoards, thereafter, a significant percentage each year is single finds (fig. 2); and while until 1969, single finds usually are, at the most, around 100 coins per year, this figure multiplies by a factor of up to c. 50 from 1970 onwards (fig. 3).

At first, this seems hardly to have been perceived as a problem by professional archaeology: there is little evidence that the discipline reacted to it much, if at all. Only after decade and a half, professional archaeology seems to have started to take action, but sadly, from then on, the situation has not improved. Today, most Austrian archaeologists are opposed to (almost all forms of) non-professional metal detecting (e.g. Hebert 2011; Leskovar, Traxler 2010, 59–64), with only a few exceptions (e.g. work by Gerald Grabherr and Barbara Kainrath with Tyrolean metal detectorists to trace Roman roads; Grabherr 2006). Most archaeologists in Austria seem to consider almost all non-professional metal detecting as ‘looting’, as the largely synonymous use of the terms *Metallsucher* (metal detectorist) and *Raubgräber* (looter) demonstrates (e.g. Leskovar, Traxler 2010, 59–60).

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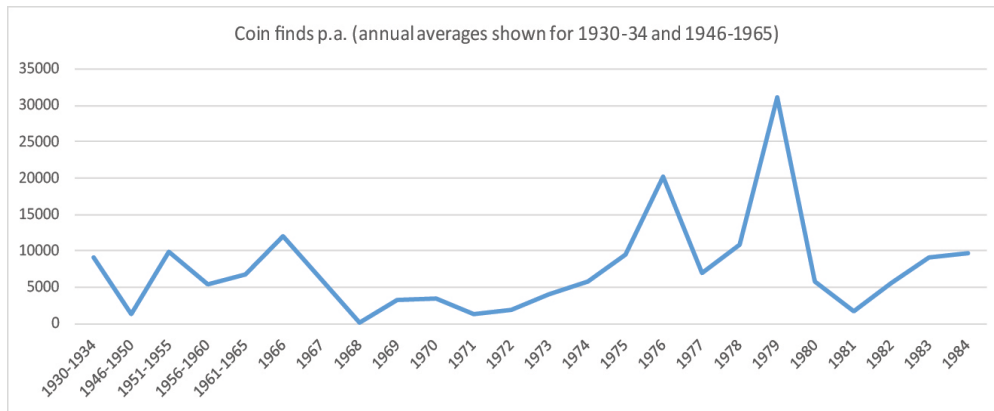


Fig. 1: Number of coins found in Austria per annum in the period 1930-34 and 1946-1984 according to the FÖ (BDA 1934-1984; annual averages shown for periods 1930-34 and 1946-1965 due to nature of reporting in FÖ).

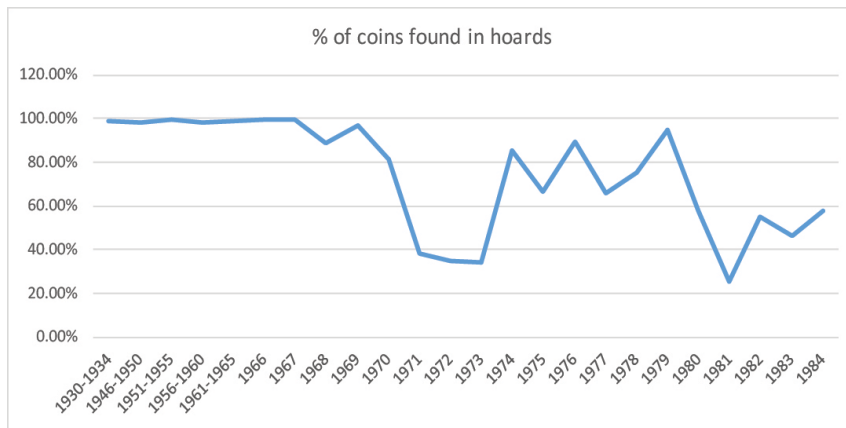


Fig. 2: Percentage of coins found in hoards (BDA 1934-1984; annual averages shown for periods 1930-34 and 1946-1965 due to nature of reporting in FÖ).

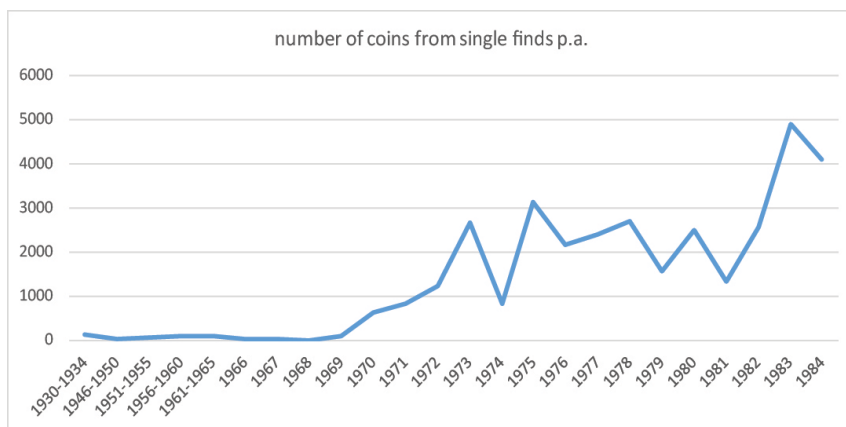


Fig. 3: Annual amount of coins from single finds (BDA 1934-1984; annual averages shown for periods 1930-34 and 1946-1965 due to nature of reporting in FÖ).

2 Law, Archaeology, and the Public, Pre-1970s

Austria passed its first National Heritage Law, the *Denkmalschutzgesetz* (DMSG), in 1923. This law, which is still – albeit in revised version – in force today, contained three main provisions regarding the archaeological heritage. Firstly, it included a provision that all archaeological finds had to be compulsorily reported to the BDA by their finder (§ 9 DMSG 1923). Secondly, it stipulated that the find and its find spot had to be left undisturbed for a period of 4 days until after this report had been submitted, so that an agent of the BDA could properly record the find and its archaeological contexts, or until an agent of the BDA approved the resumption of any works that had led to the discovery of the find (§ 10 DMSG 1923). Thirdly, it contained a provision that excavations for the purpose of discovering and recovering archaeological finds required the approval of the BDA (§ 11 DMSG 1923).

This third provision, incidentally, was not intended as a restriction to prevent illicit excavations, as it would perhaps be interpreted by the casual archaeological reader today, but served the opposite purpose. Since the provisions of §§ 9-10 DMSG 1923 contained no exceptions, they would have made planned archaeological excavations virtually impossible: whenever a find would have been made during such a dig, it would have had to be reported to the BDA immediately and all works on site stopped for up to 4 days, so that an agent of the BDA could record the find and its context; that is, do what – in all likelihood – those who were planning the excavation intended to do anyway. Thus, the possibility provided by § 11 DMSG 1923 to get pre-approval by the BDA of a planned archaeological excavation created the necessary exemption of such digs from the provisions of §§ 9-10 DMSG: it is an excavation-enabling rather than a preventative provision.

In practice, the BDA since 1923 and its ‘predecessor’, the *k.k. Central-Commission zur Erforschung und Erhaltung der Kunst- und historischen Denkmale*, since 1850, had always strongly relied on ‘amateur’ archaeologists and professional archaeologists willing to volunteer their time to actually conduct fieldwork and act as agents on its behalf. That is hardly surprising: in 1923, when the DMSG came into force, the BDA employed but one professional archaeologist, Georg Kyrle (Brückler, Nimeth 2001, 149).

Thus, approvals according to § 11 DMSG 1923 could be given to any Austrian citizen; not just to professional archaeologists. And in fact, they were often given to non-professionals well into the 2nd half of the 20th century: for instance, the longest ‘finds’ report for the year 1971, found in FÖ 10 (BDA 1971, 102-127), is of the excavation of 249 burials at Mödling ‘*goldene Stiege*’ and was written by Hermann and Lotte Schwammenhöfer, two ‘amateur’ archaeologists, who had directed that particular field season at that site. ‘Professional’ archaeologists and members of the public, by and large, cooperated very well back then.

3 Initial Reactions to ‘Amateur’ Metal Detecting, c. 1970-1985

Austria had signed and ratified the London Convention (CoE 1969) in 1974. However, a planned new archaeological heritage protection law never made it onto the statute book. With parliament still considering this new law in 1978, the archaeological provisions of the DMSG were not significantly changed in its first major revision (Helfgott 1979; Bazil et al. 2004; RV 1990, 9-10).

While metal detecting had certainly come to the attention of the BDA and the wider archaeological profession pretty much immediately, the legal situation – effectively as described above, even after the 1978 revision of the DMSG – was difficult where this emerging hobby was concerned. In practice, the BDA had long treated the legal provisions of the DMSG as covering two distinctly separate categories of archaeological finds: §§ 9-10 DMSG 1923 and 1978 as covering ‘chance’ finds; § 11 DMSG 1923 and 1978 as covering planned, ‘systematic’ archaeological excavations.

Yet, the practices of the new metal detectorists fell somewhere in between those two categories: in some respects, their finds were like ‘chance’ finds; e.g. in that one could not properly predict when and where they would be made; and in that they were usually just single, individual items without any meaningful ‘archaeological context’ (at least in the understanding of the 1970s in Austria of this term), as most came either from the surface or the topsoil. Yet in other respects, particularly where objects found in greater

depths were concerned, they were ‘excavated’, at least sometimes from ‘undisturbed’ archaeological strata, and thus more akin to the second category of finds.

Treating metal detectorists and their finds as ‘chance’ finds according to §§ 9-10 DMSG 1923 and 1978 would have been highly impractical: even if they would have left their often hundreds of small finds in situ, the BDA simply lacked the personnel resources to send an agent to every such ‘find spot’ within the 4 days (5 from DMSG 1978 onwards) required by law. On the other hand, metal detectorists did not consider their own activities as ‘archaeological excavations’, since they didn’t dig sizeable trenches. Rather, at the most, they were digging small pits like for planting something, which didn’t require any pre-approval by anyone, least of all the BDA. Thus, they weren’t applying to the BDA for pre-approval of (or ‘permit’ for, from DMSG 1978 onwards) their ‘excavations’. They wouldn’t have met with much of a welcome anyway, since the BDA wasn’t inclined to give metal detectorists such pre-approvals or permits if it could avoid doing so. Metal detecting by the public quickly started to be perceived as a threat by the archaeological profession. Yet, with the law not sufficiently clear, there was little that could be done at first.

The first opportunity to ‘do something’ only arose when, in 1979, Norbert Helfgott, the head of the ministerial department responsible for heritage protection and de facto-author of the 1978 revision of the law, published his legal commentary to the revised DMSG (Helfgott 1979). Without providing any reasons for why this should be the case, Helfgott (1979, 83) claimed that the provisions of § 11 DMSG 1978 for ‘archaeological excavations’ also covered such that were only very shallow and where the find had already been located by metal detector. The aim, in effect, was to make metal detecting without a permit by the BDA illegal and thus ‘prevent’ it from happening.

Of course, such commentary is not law and thus not binding until tested in the courts. While the BDA from now on deemed ‘unauthorised’ metal detecting a breach of the DMSG, a case had to be found and fought to ensure that this interpretation of the law would be upheld. When in 1982, a metal detectorist had been caught ‘red-handed’ during an ‘unauthorised excavation’ by a policeman, a case was brought and quickly won by the BDA in the lower administrative courts. By 1985, the case had reached the supreme administrative court, the *Verwaltungsgerichtshof* (VwGH), due to the metal detectorist appealing his conviction. In its decision (VwGH 24.6.1985, 84/12/0213), the supreme court upheld the interpretation of Helfgott’s commentary: even shallow excavations, even if only made by hand, constituted an ‘archaeological excavation’ requiring a permit by the BDA.

Of course, it is quite questionable whether the supreme court came to this decision based on reliable information by the archaeological authorities. Its view of professional archaeological excavation practice, for instance, which forms part of the explanation of the reasoning that led to its decision, deviates considerably from archaeological reality: ‘The use of “excavation tools (mechanical digger, shovel, etc.)” would seem positively atypical for professional archaeologists when expecting small finds, since that would threaten to damage the find.’ (VwGH 24.6.1985, 84/12/0213, 4; translation RK). Just to confirm from personal experience during the first year of my degree of excavations conducted by the BDA in 1987: the use of mechanical diggers, shovels and other ‘excavation tools’ was the rule, not the exception, when expecting to find small finds. That personal experience can easily be confirmed by reviewing publications by the BDA’s own staff from the time (e.g. Neugebauer & Gattringer 1988, 65, also see Abb. 16, 25; Neugebauer et al. 1990, 47) in its official annual finds reports, the *Fundberichte aus Österreich*.

Despite Helfgott’s interpretation of the term ‘archaeological excavation’ prevailing, the case was lost by the BDA and the metal detectorist acquitted by the supreme court. This was for the reason that he had, consistently, argued that he had not dug at all but only collected his finds (8 rather common Roman coins) from the surface after locating them with his metal detector. This argument, however, had not been challenged by anyone during the whole case: all the lower courts, as well as the BDA, had simply assumed that he had dug and had not explained why they did not believe the metal detectorists’ claim to not have dug at all. Yet, § 11 DMSG 1978 only covered excavations, not the recovery of finds from the surface, and thus, the VwGH (24.6.1985, 84/12/0213, 5-6) had to quash the earlier convictions.

What the BDA had pursued as a test case to establish that metal detecting fell under the provisions of § 11 DMSG 1978 had seriously backfired. While its preferred interpretation that any digging for archaeological finds, however shallow, constituted an ‘archaeological excavation’, had been upheld, it would now have

to prove digging to be able to convict a metal detectorist for ‘unauthorised excavations’. Thus, while technically, the BDA could now claim that virtually all metal detecting for archaeological finds required a permit according to § 11 DMSG 1978; in practice, unless someone was caught red-handed while actually digging for and finding something, metal detectorists could hardly ever be convicted if they claimed that they had not dug at all. This clearly was no satisfactory outcome.

The immediate reaction by the BDA to this supreme court decision was to change one of its practices. You may have wondered why the data on coin finds reporting in figs. 1-3 above ends in 1984, rather than continuing until 2014, the latest volume of the FÖ available. The simple reason for this is that from 1985 onwards, the BDA stopped to include reports of coin finds in its official finds reports: metal detectorists and their finds – mostly coins in the volumes up to 1984 – were no longer welcome at all.

4 Focussed on Prohibiting Metal Detecting: 1985-Present

If not before, from now on, Austrian archaeology, and especially the BDA, focussed on one goal: prohibiting metal detecting, whatever the cost. The means by which that goal was hoped to achieve was by arguing for tougher laws.

The first step in this process was in 1990, when the next major revision of the DMSG was passed. In it, the differentiation between ‘chance’ finds covered by §§ 9-10 DMSG 1990 and ‘intentional finds’ covered by § 11 DMSG 1990 was formalised and a general prohibition against metal detecting on scheduled monuments added in § 11 (8) DMSG 1990. However, most significantly, the provisions of § 11 (1) DMSG were changed considerably, to make a permit by the BDA a requirement for all metal detecting for archaeological finds. The wording of § 11 (1) DMSG, which had previously only covered ‘excavations’, was changed to also include any ‘*searches in situ with the purpose of discovering and examining portable and immovable monuments beneath the surface of the earth or water*’ under the legal term ‘*research excavation*’ (translations: RK). It is plainly obvious that this is a reaction to the case described above: had the law in 1985 already included not just ‘excavations’, but also ‘searches with the purpose of discovering and examining’ archaeological finds, the conviction against the metal detectorist would certainly have been upheld by the VwGH. The new wording also considerably restricted to whom ‘excavation permits’, as they now were called, could be issued: either to graduates of an archaeology degree; or to people who had received other training and had passed an examination by a commission to be set up by the BDA.

For the BDA, however, this didn’t go far enough: metal detectorists, at least theoretically, could still apply for a permit; and if they passed the examination, would have to be granted a permit unless there were compelling reasons as to why not. So a typically Austrian, temporary solution to this problem was found: the commission supposed to conduct the examination was never established and no examination rules developed. As a consequence, in practice, the issuing of ‘excavation permits’ had been restricted to just archaeology graduates.

The second step came in 1999 with the next revision of the DMSG, when that temporary solution to bypass the law was turned into law. The provisions of § 11 (1) DMSG were changed even further: from now on, permits for ‘research excavations’ could only be issued by the BDA to individuals who had graduated in an archaeological subject at University. Finally, it seemed as if the goal to prohibit metal detecting (and any other fieldwork) by non-professionals completely had been achieved. It is, in this context, interesting to read a summary by Hubert D. Szemethy (2004, 160-161) of what the BDA thought about this in 2003: it believed that illegal metal detecting was not just moving from the open fields to the forests (because they were offering better cover), but also generally decreasing. The BDA believed that this was at least partially due to the fact that since the DMSG 1999, it no longer ‘had to’ issue ‘search permits’ to metal detectorists. Successful prosecutions of offenders, the BDA believed, were also effective. At the same time, the BDA observed that (and apparently had no explanation for why) the number of finds reports was declining (Szemethy 2004, 160; cf. Karl 2011, 116-120), despite the reporting of ‘chance’ finds being compulsory by law.

The 1999 revision of the DMSG saw yet another, significant change: until 1999, the ownership of archaeological finds had been determined according to the general finds provisions of Austria’s

general civil law, the *Allgemeines Bürgerliches Gesetzbuch* (ABGB). This (since 1812) had distinguished between three categories of ‘finds’: finds of forgotten or lost objects, which had to be reported and were returned to their previous owner if he came forward, or else became property of their finder (§§ 388-396 ABGB); those of ordinary ‘hidden’ objects whose previous owner could not be determined, who became property of the finder (§ 397 ABGB); and those of ‘hidden’ objects with high monetary value (aka ‘treasure’), which were shared equally between finder and landowner (§§ 398-401 ABGB). Of those, the latter two applied to archaeological finds as appropriate: low value objects went to the finder, high-value ones were shared equally with the landowner. Only in the 1999 revision of the DMSG, a new provision was introduced in § 10 DMSG 1999 that all archaeological finds, regardless of their value, were now to be considered ‘treasure’ according to §§ 398-401 ABGB, and thus to be shared equally between finder and landowner.

Allegedly introduced to ‘simplify’ the law (RV 1999, 53-54), the real reason for this change was a different one: under the ‘old’ regulations, low-value finds had always become the property of the finder; even if they had been made during ‘illegal excavations’. Neither the provisions of the ABGB nor the Austrian penal code allowed the state to confiscate these finds, since only their rightful owner – who could, after all, no longer be determined in case of archaeological finds – could take legal action against someone who had illegally acquired his property. Where finds of ‘treasure’ were concerned, however, the state had a right to confiscate the finder’s share of any ‘treasure’ acquired illegally by him according to § 400 ABGB. Thus, by changing the legal status of all archaeological finds to ‘treasure’ in the DMSG 1999, the BDA acquired a legal means to take ‘illegally excavated’ archaeological finds off their finders. What the BDA actually wanted was not a simpler law, but one that allowed it to take the ‘proceeds of their crimes’ of metal detectorists.

The latter is apparent from a short summary of the main changes to the law, published in 2000 in the journal *Archäologie Österreichs* by the then head of archaeology in the BDA. Rather than focussing on the more immediately important point for professional archaeologists – that finds of low value would no longer automatically be property of the organisation who had excavated them under the provisions of § 397 ABGB, but would become shared property of finder and landowner under the provisions of § 399 ABGB from now on – what is highlighted in this discussion is that the finder’s share of finds made during unpermitted excavations would become property of the federal government (Farka 2000, 79). The message sent by highlighting this aspect of the changes to the law, rather than the one affecting professional archaeologists, is clear: the BDA reported that it finally had been successful in getting a legal means to confiscate the finds of metal detectorists.

5 Consequences

This focus on prohibiting metal detecting, however, had a number of (unintended) side-effects seriously detrimental to the protection of the archaeological heritage. The most significant ones for archaeology are the following:

Perhaps the most obvious one is that resulting from the change just discussed above: before the 1999 revision, most finds made during professional archaeological excavations became the property of the archaeological institution conducting the excavations, as ‘finders, keepers’ applied (unless the dig was a commercial dig, in which case the funder became their owner). Only where truly valuable objects were concerned, the landowner acquired a 50% ownership share. Since the 1999 revision of the DMSG, the landowner automatically acquires a 50% ownership share in each and every archaeological find made, since all of them are now considered to be ‘treasure’. Thus, where an agreement with the landowner only had to be found regarding a handful of ‘treasure’ finds before, since 1999, any agreement needs to cover each and every single find made. Particularly for finds-rich excavations, this can make a huge difference in terms of the financial compensation of a landowner: if the average value of, say, 50,000 sherds of pottery is € 0.01, the compensation to be paid to the landowner is € 500; if it is 0.02, it is € 1,000, etc. This makes negotiating with landowners much more difficult; negotiations are now about the Cent-values of thousands of objects, rather than the Euro-values of but a few. The consequence is that more often than not, ownership remains

shared or, even worse, unclear, which certainly makes ensuring the long-term survival of the archaeological record more difficult rather than simpler.

Another, perhaps even more problematic consequence results from restricting excavation permits exclusively to archaeology graduates. Until the 1990 revision, everyone could apply for and receive a permit, even institutions. Since then, however, only individuals, and effectively only archaeology graduates, can apply for and be issued a permit. This means that any conditions set within that permit only apply to that particular individual. Yet, that individual is hardly ever the owner of any finds made during the excavation. Rather, this is either the organisation s/he is working for, or the organisation that funded the excavations, and since 1999 always also the landowner. Thus, any conditions about where finds should be deposited, how they should be treated, etc., as are regularly set by the BDA in permits issued, only bind the archaeologist who doesn't own the finds. It does not bind the owners of the finds, who instead can do with their property as they wish. Thus, rather than enabling the BDA to actually protect the archaeology, it has reduced its ability to do so.

But perhaps the most absurd of all consequences is the following: since any search in situ to discover archaeology now requires a permit by the BDA, any professional archaeological survey or excavation needs to be permitted and adhere to conditions set by the BDA, which go as far as determining precisely what file formats and abbreviations have to be used (BDA 2016, 11-44). This is the case even if a site is perfectly well-known and has frequently been researched already. Naturally, such permits can also be refused by the BDA if it deems the proposed works unnecessary, or as not in line with its particular quality standards. Yet, if the site is not scheduled (and only about 1.100 archaeological sites in Austria are scheduled), its owner can intentionally destroy any archaeology there by driving through it with a heavy mechanical digger without requiring any kind of permit or approval by anyone (Krieglsteiner 2015). After all, he is the owner of the land on which it is found, and thus is legally entitled to do with his property as he pleases, including destroying anything on it. Thus, non-invasive archaeological research like magnetometry is illegal without a permit by the BDA, even though this research cannot seriously damage the archaeology examined; while wanton destruction of that very same archaeology is entirely legal.

This last absurdity, incidentally, is particularly noteworthy for another reason: in Austria, the freedom of research is a constitutionally guaranteed civil liberty of every citizen (Art. 17 StGG), regardless of whether they have any academic (or indeed other) qualifications (Berka 1999, 343-4). Thus, the prohibition against non-invasive research without a permit by the BDA contained in the current phrasing of § 11 (1) DMSG 1999, in all likelihood is unconstitutional and thus, in itself, illegal. It seems rather ironic that professional archaeology's focus on prohibiting non-professional metal detecting may well have made the law to protect archaeology constitutionally untenable (also see Karl *forthc.*).

6 But it Worked, Hasn't it?

The underlying assumption of the strategy chosen by Austrian professional archaeology, and particularly the BDA, to prohibit non-professional metal detecting by law, is that the threat of punishment for breaking the law has a preventative effect. If that assumption were correct, increasingly tougher legislation should have reduced the number of active non-professional metal detectorists in Austria. And as shown before, the BDA did indeed believe that prohibition works (Szemethy 2004, 160).

Of course, that assumption is a bit ridiculous in itself: if a prohibition against digging for archaeology without a permit by the BDA, which has existed since 1923, didn't achieve this preventative effect, why should a prohibition against searching and digging for archaeology? That the preventative effect of prohibitive legislation is negligible should also be well-known these days, not just from the famous American case of the attempted prohibition of alcohol (Behr 1996), but also from studies of the psychology of legal compliance (Tyler 2006) and legal advice in the context of heritage law (e.g. Löhr 2006, 134). And the BDA did, in fact, never check whether its assumptions and hopes had the desired effect in reality: it simply assumed that that which must not be cannot be.

If one actually examines the development of non-professional metal detecting in Austria, e.g. by making inquiries within the metal detecting community or by examining the development of the membership of

metal detecting discussion groups (fora) on the internet, it quickly becomes apparent that ‘the hobby’ has not declined after the introduction of tougher laws prohibiting it, but continues to grow unabatedly. The Austrian metal detectorist community itself believes that the number of people actively pursuing this hobby has risen relatively steadily since its beginnings, doubling each decade from c. 250 in the 1970s to c. 2,000 by 2010 (Karl 2011, 120). This or an even faster growth rate is also evident in the increase in subscribers of Austrian internet metal detecting fora: the membership of the largest one alone has risen from 2,203 on 2.3.2015 to 2,578 on 25.1.2016, an estimated annual growth rate of c. 20%.

If one compares per capita figures of subscribers of metal detecting internet fora in Austria, Germany and Britain (Karl, Möller 2016), the result is not, as the assumption of the preventative effect of prohibitive legislation requires one to expect, that those countries with a more restrictive legislation have considerably less metal detectorists than those taking a more liberal approach. Rather, the opposite seems to be the case: for every person per capita subscribed to a British metal detecting discussion forum on the internet, there are about 2 in Austria and about 3 in Germany (fig. 4, 5).

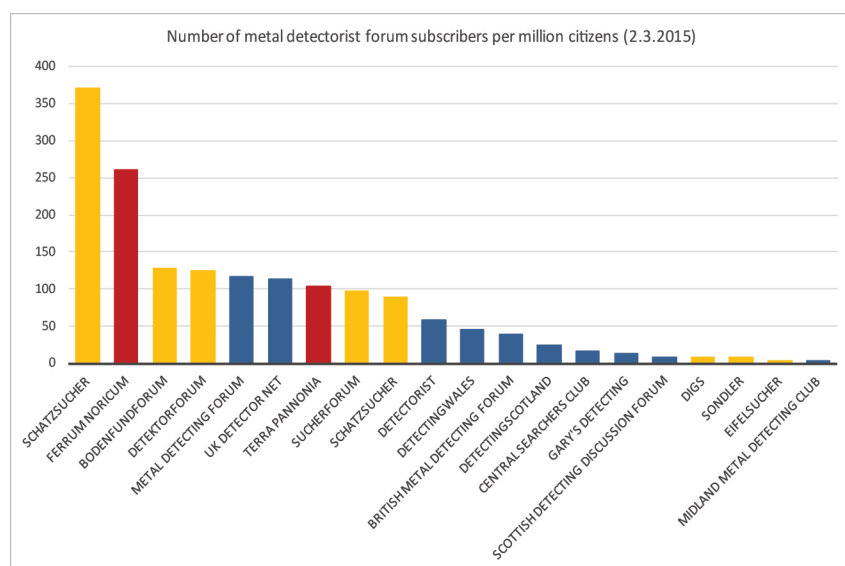


Fig. 4: Number of metal detectorist forum subscribers per 1 million citizens of Germany (yellow bars), Austria (red bars) and Britain (blue bars) on 2.3.2015 (Karl, Möller 2016).

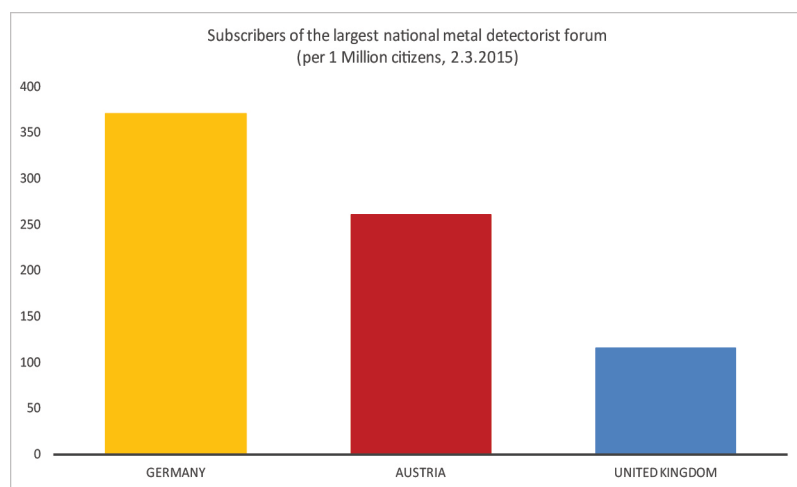


Fig. 5: Number of subscribers of the respectively largest national metal detectorist forum per 1 million citizens of Germany (yellow bar), Austria (red bar) and Britain (blue bar) on 2.3.2015 (Karl, Möller 2016).

While the reliability of membership data of such fora can be questioned, at least at this time, there is no evidence that suggests a sufficiently massive bias towards an over-representation of Austrian metal detectorists compared to British metal detectorist in this data. Virtually all independent variables that can be controlled for seem to be roughly equal between all three countries compared (also see Karl, Möller 2016, 221-222). For instance, all three countries have populations with roughly similar levels of access to the internet, similar wealth, and similar amounts of spare time per week. Similarly, the density of archaeological sites productive for metal detecting on average would also seem to be roughly the same in all three countries compared. At least, this is what my own experience suggests and a rough comparison of the distribution and frequency of sites where data is publicly available (e.g. in British Historic Environment Records like <http://www.cofiadurcahcmru.org.uk/arch/> [18/10/2016], and the Bavarian Denkmalatlas, <http://www.blfd.bayern.de/denkmalerfassung/denkmalliste/bayernviewer/> [18/10/2016]) would seem to indicate. Sadly, such comparisons of site and finds distribution density must remain rather impressionistic: comparable data does not exist in published, easily accessible form, for Austria and many parts of Germany. In many German states, public access to archaeological site registers is even considerably restricted by law (e.g. § 14 (2) Denkmalschutzgesetz Baden-Württemberg, § 3 (5) Denkmalschutzgesetz Brandenburg, § 6 Abs. 1 Denkmalschutzgesetz Hamburg). The rationale given for such secrecy in government explanations of heritage laws is to protect archaeological sites from looting (e.g. Hamburg 2013, 4). Bias in the distribution of metal detectorists due to possible differences in site distribution density thus cannot be ruled out.

It would also be a mistake to believe that the ‘anonymity’ of the internet provides added protection compared to meetings of like-minded individuals in metal detecting clubs or societies. Not only are such discussion groups regularly monitored by quite a few professional archaeologists, but IP-addresses easily traceable to their source for prosecuting authorities. And the metal detectorist members of such groups are very well aware of both these facts. Compared to the illusion of privacy provided by an online alias or screen name, the privacy provided by the back rooms of a local pub or inn is very real. Whether such meetings of like-minded metal detectorists are called a ‘club’ like in Britain or just a ‘Stammtisch’ (like some of those I have personally attended in Austria) makes little difference, they happen in real life whether ‘the hobby’ is treated as an illegal activity by the authorities of a country or not. Thus, the belief is misguided that in countries where metal detecting is illegal, metal detectorists are more inclined to meet ‘anonymously’ on the internet rather than in real life to exchange experiences and show their finds to their peers. Rather, the opposite would have to be expected: where ‘the hobby’ is considered to be illegal, showing one’s finds off on the internet is risky and thus less likely to happen than in countries where metal detecting is mostly legal.

But even if any of these variables, or indeed an unknown independent variable, would significantly bias the results, this bias would have to be massive to reverse the results of our study. After all, even parity of per capita numbers of metal detectorists would still not prove that the restrictive legislative approaches taken by Austria and Germany work any better for reducing the number of metal detectorists than the more liberal British one. Rather, the per capita number of metal detectorists in Britain would need to be significantly higher than in Austria (and Germany) to demonstrate that the restrictive approach is more effective. For that, however, one would need to assume that 100% of Austrian and German active metal detectorists are subscribed to at least one such discussion group, but considerably less than 30% of the British ones. To arrive at the reverse of the ratio observed by us (Karl, Möller 2016, 219-221), it would even need to be less than 10% of all British active metal detectorists. That seems exceptionally unlikely.

It thus has to be assumed that these results allow a reasonably reliable assessment of the effectiveness for reducing the number of metal detectorists of the respective legal regimes in these three countries. And the countries with more restrictive laws do not fare well in it. Therefore, the approach taken by the Austrian archaeological authorities to try to reduce the attractiveness of metal detecting by trying to prohibit it completely must be judged to have failed completely.

Instead of trying to strictly prohibit (all) non-professional metal detecting (perhaps with the exception of a few archaeologist-led projects like some that do exist in Austria; e.g. Grabherr 2006), it would seem much more promising to me to enshrine in law minimum standards for recording archaeological finds (cf.

Karl 2017, 10-12; forthc.), with permissions only required for archaeological fieldwork on scheduled sites (as is the case in Great Britain; and may well be the correct interpretation of § 11 (1) DMSG in Austria). If such recording standards were variable – requiring less detailed recording for surface and topsoil finds than for finds from deeper strata, and more detailed recording for large-scale archaeological excavations and development-related works – the percentage of properly recorded and reported finds and contexts would surely increase considerably, while the damage done by unrecorded and unreported excavations reduced. Such a system would also make prosecutions of anyone – whether metal detectorist, developer or archaeologist – who does not properly record and report archaeology much easier than it is now, where intent to discover archaeology and intent to not report it has to be proven before a conviction can be secured, while archaeological damage caused is not considered at all. And most importantly, such variable minimum standards would be a constitutionally sound means of archaeological quality assurance, since they would not disproportionately restrict the freedom of research (Karl 2017, 10-12; forthc.).

7 Conclusions

The empirical evidence available thus does not support the idea that the Austrian approach to preventing non-professional metal detecting by restrictive legal prohibitions has been successful. Quite to the contrary, not only have 5 decades of professional archaeological obsession with prohibiting non-professional metal detecting resulted in an abject failure to achieve the intended objective, they have also resulted in much worse protection for archaeological heritage than existed before 1970.

The law (and its interpretation) was changed to prevent metal detectorists from searching and digging for archaeology and to enable the BDA to confiscate their finds if they do so regardless, in the hope that such prohibitions and disincentives would detract people from engaging in ‘the hobby’. Yet the number of people walking through the Austrian countryside, armed with their trusted metal detector and spade, has consistently increased over the last 5 decades, to numbers roughly twice as high per capita as in the UK with its more liberal approach.

All the while, the changes to the law have made protecting archaeological heritage from destruction, and researching archaeological heritage (which to enable, after all, is the ultimate purpose of archaeological heritage protection) all the more difficult. While those select few archaeology graduates who can still get a special permit are encumbered with bureaucratic rules, even if the fieldwork they have planned cannot imaginably endanger any archaeological evidence in situ; all other Austrian citizens effectively are excluded from conducting independent archaeological field research, despite the fact that freedom of research is one of their constitutionally protected civil liberties. And sorting out the ownership of finds had become more complicated, rather than simpler, with most finds made even on professional archaeological excavations now at least part-owned by private citizens, rather than by publicly owned collections (most of whom are bursting at the seams anyway), with all the negative consequences that entails.

Meanwhile, the metal detectorists simply ignore the prohibitive law, since they don’t accept its legitimacy. And who can blame them, seeing that the law may well have become unconstitutional as a result of the changes made to it for the purpose of prohibiting metal detecting in its last two revisions? The only effect the prohibitive approach has had is that the steadily increasing numbers of metal detectorists do not report their finds (any more). Since if they do, they may well be prosecuted for (illegally?) damaging unknown archaeology of indeterminate significance in one field, while the wanton destruction of known archaeology with known significance by the mechanical digger of the landowner in the next field is perfectly legal.

The real consequence of trying to solve the metal detecting problem by stricter legislation is that the damage to archaeology has increased, rather than decreased. And that, by any measure, is not a good outcome.

Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian civil law)
BDA	Bundesdenkmalamt (Austrian National Heritage Agency)
FÖ	Fundberichte aus Österreich (annual national finds reports publication, BDA 1934-2014)
DMSG	Denkmalschutzgesetz (Austrian heritage protection law)
StGG	Staatsgrundgesetz 1867 (Austrian constitutional law of civil rights and liberties)
VwGH	Verwaltungsgerichtshof (Austrian administrative supreme court)

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